No. 48559-1-II

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent,

v.

WEYERHAEUSER COMPANY,

Appellant.

REPLY BRIEF OF APPELLANT

Craig A. Staples, WSBA #14708
P.O. Box 70061
Vancouver, WA 98665
(360) 887-2882

Attorney for Weyerhaeuser Company

P.M. 7/26/2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Weyerhaeuser submits the following in reply to claimant's Brief of Respondent.

A. ARGUMENT

Claimant argues the liberal construction doctrine applies to the issue presented here. (BR 8). The liberal construction doctrine is what its name implies—a doctrine that applies to issues of statutory construction. In *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d 498, 208 P.2d 1181 (1949), the Supreme Court stated:

> "We have again and again declared that, while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive benefits provided by the act." [Citations omitted.]

34 Wn.2d at 505. Claimant may not rely on the liberal construction doctrine to support his position on appeal because the appellate courts already have construed RCW 51.08.140 to require proof that a claimed disease "arose naturally" out employment conditions that were "distinctive," compared to activities that are common to employment generally and everyday life, when viewed as a cause of the disease. *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 479, 745 P.2d 1295 (1987); *Gast v. Department of*

Labor & Indus., 70 Wn. App. 239, 243, 852 P.2d 319, *rev den* 122 Wn.2d 1024 (1993); *Witherspoon v. Department of Labor and Industries*, 72 Wn. App. 847, 851, 866 P.2d 78 (1994).

As discussed in the Brief of Appellant, the courts also have held that issues of medical causation must be proved through expert medical testimony. *Dennis,* 109 Wn.2d. at 477*; Zipp v. Seattle School Dist. No. 1,* 36 Wn.App. 598, 676 P.2d 538 (1984). Claimant concedes that medical testimony is required to establish an occupational disease under the "naturally" prong of the test, but then asserts the courts have not required medical testimony to establish the claimant's work conditions were "distinctive" to his particular employment. (BR 14). There is no legal or logical basis for disconnecting the term distinctive, and its associated proof requirements, from the term "naturally," and the undisputed need to prove it exists through medical testimony.

In Dennis, the court stated:

> "...**[I]n construing the term 'naturally'** in its ordinary sense, the meaning of the term must be tied to the 'arising out of employment' language. We hold that **a worker must establish** that his or her occupational disease came about as a matter of course as a natural consequence or incident of **distinctive conditions** of his or her employment.* * *" (Emphasis added.)

109 Wn.2d at 481. The court's analysis demonstrates the requirement that the employment conditions be "distinctive" derives from, and is therefore inseparable from, the "naturally" prong of the occupational disease statute. Therefore, since—as claimant concedes—medical testimony is required to prove the "naturally" element of an occupational disease, medical testimony necessarily is required to prove the employment conditions were distinctive, when viewed as a cause of the condition in question.

Claimant's contrary argument also disregards the commonly accepted meaning of the phrase "arises...out of," which provides the definitional context of the "naturally" and "proximately" prongs in the occupational disease definition. As discussed in the Brief of Appellant, the phrase "arises (or arising) out of" is used almost universally in workers' compensation laws to define the scope of allowable conditions, and it is commonly interpreted as requiring that a claimed condition be causally connected to a particular risk of the employment. *See* 1 Larson, *Workers' Compensation Law* § 6.00 to 6.10, at 3-1 to 3-3 (1997) (Brief of Appellant 20). In short, "arises out of" addresses causation. The legislature's use of the "arises out of" phrase therefore imposes a causation analysis for

determining whether the disease "arose naturally" from the employment. As stated, proof of such causation requires medical testimony—specifically, to demonstrate the employment conditions were distinctive to the particular employment when viewed as a cause of the disease.

Claimant also asserts: "Determining whether work conditions are distinctive to a particular employment is not a medical determination. Rather, it is a question of fact to be determined by the trial court." (BR 13). Claimant provides no authority for concluding that a determination of distinctiveness is not a medical question. As discussed in the Brief of Appellant and above, the need to prove "distinctive" conditions derives from the requirement that the claimant's disease "arise naturally...out of" his particular employment; and both the "arises...out of" and "naturally" components of this phrase present an issue of causation. Claimant makes no attempt to address the nature and appellate interpretation of these terms, but responds only with a bare assertion that suggests these terms should not be given their established meanings. There is no basis for doing so. Since the issue of "distinctiveness" presents a causation issue, it necessarily

involves a medical determination—because medical testimony is required to prove causation.

Further, the factual nature of the causation question does not obviate the need for medical testimony, as claimant suggests. It probably is more accurate to say that whether a disease arose naturally out of distinctive employment conditions presents a mixed question of fact and law. But, regardless, even issues of fact require evidence to establish the determinative fact, and the nature of the evidence that is necessary turns on the nature of the fact to be established. Claimant wrongly suggests a trial court is competent to determine whether employment conditions present a distinctive risk of causing a particular medical condition without benefit of expert medical evidence on that point. As stated, the issue of distinctiveness presents a question of medical causation, and questions of causation indisputably require medical testimony.

The requirement of distinctiveness presents no less an issue of causation than the requirement of proximate causation. The legislature placed the "arises naturally" and "proximately" terms in the same phrase that makes up the heart of the occupational disease definition. Claimant does not explain why the "arises

proximately" requirement establishes a causation question for medical experts, while the "arises naturally" requirement does not.

Claimant next contends that the testimony of the attending physician, Dr. Peterson, is entitled to "special consideration" and that it was reasonable for the jury to infer from her testimony that claimant had met his burden of proof related to the "arises naturally" requirement. (BR 11). The issue of "special consideration" goes only to the jury's analysis of the medical evidence. It is separate from, and does not address, the type of evidence that is required to sustain the burden of proof. There still must be medical testimony addressing each element of claimant's burden of proof to which the jury may give "special consideration." More specific to this case, there must be medical testimony that provides the jury some basis for determining that claimant's particular work conditions were distinctive, compared to other employments generally, as well as daily life. A jury may not properly infer anything when there is no medical evidence on the point in question.

In short, the principle of giving "special consideration" to the attending physician does not obviate the need for expert evidence

on each element of the burden of proof. It is not a talisman that can transform an evidentiary void into substantive evidence sufficient to sustain that burden of proof.

Claimant also argues that Dr. Peterson's testimony was sufficient to satisfy his burden of proof on the "arises naturally" issue based largely on her statements that address the question of proximate causation. (BR 10-11). However, such testimony was not directly or impliedly based on a comparison of claimant's particular duties to the type of activities prevailing generally in other employments, or everyday life. In the absence of such a comparison, there is no basis for concluding claimant's particular work conditions were distinctive.

Both *Dennis* and the ordinary meaning of "distinctive" compel such a comparison. In stating what must be proved to satisfy the "arises naturally" requirement, the *Dennis* court explained there must be proof that the worker's:

> "...occupational disease came about as a matter of course as a natural consequence or incident of *distinctive* conditions of his or her employment....The worker in attempting to satisfy the 'naturally' requirement, must show that his or her particular work conditions *more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general*; the

> disease or disease-based disability must be a natural incident of conditions of that worker's particular employment." (Emphasis added.)

109 Wn.2d. at 481. By contrasting the worker's "particular employment conditions" with "conditions in everyday life or all employments in general," the court's analysis demonstrates the need for a comparison of the worker's work activities with those existing generally in other employments and daily life to determine whether the worker's exposure was distinctive when viewed as a cause of the disease in question.

The ordinary definition of "distinctive" further demonstrates the need for such a comparative analysis. The term "distinctive" is defined as "serving to distinguish." *Merriam Webster's Collegiate Dictionary* 338 (10th ed. 1997). "Distinguish" means "to mark as separate or different"; "to separate into kinds, classes or categories"; "to give prominence or distinction to"; or "to single out: to take special notice of." *Id.* These definitions of "distinguish" assume, and require, a comparison of one object with others. In the context of an occupational disease claim, the requirement of "distinctive" employment conditions necessitates a comparison of the worker's employment exposure with those existing generally in

other employments and daily life, with respect to its causal relationship to the worker's particular disease. Dr. Peterson's general statements about the cause of claimant's condition neither stated nor implied any such comparative analysis.

In attempting to find the requisite comparative analysis, claimant references only Dr. Peterson's response to counsel's question why claimant's "particular work as opposed to everyday wear and tear of just living" caused claimant's spondylosis. (BR 14; CP 321-22). Dr. Peterson's response to this question, particularly viewed in its context, does not support the conclusion that claimant's work activities were distinctive, largely because it was narrowly focused on the potential causes of spondylosis that existed in claimant's life, and did not compare his work exposure to the type of activities commonly found in other employments and daily life more broadly.

This particular line of questioning began with counsel's question why the work exposure was at least a cause of claimant's condition, rather than the condition being solely the result of a naturally occurring degenerative process. (CR 321, lines 13-18). After Dr. Peterson confirmed that she felt the work was a cause of

claimant's condition, counsel inquired: "And why in particular the kind of work he did as opposed to everyday wear and tear of just living?" (CR 322, lines 23-24). Dr. Peterson responded by identifying the aspects of claimant's work that she felt were strenuous, and explaining why she believed those tasks were causative. (CR 322, line 25 to CR 323, line 11). That is, in responding to counsel's question, Dr. Peterson addressed only why she felt the work exposure was a proximate cause of claimant's condition; she did not even address counsel's question to the extent it might have sought a comparison of claimant's work to the wear and tear of daily living. She simply explained the basis for her belief that claimant's spondylosis had been caused at least in part by the work and not solely by the aging process, which was the import of the line of questioning.

More important, neither counsel's question nor Dr. Peterson's response involved a comparison of claimant's particular work activities to those existing in employment in general. As the Court of Appeals (Division III) previously stated, "heavy labor" and "hard work generally" are "found in numerous types of employment and of life in general" and normally would not be considered

distinctive. *Ruse v. Department of Labor and Industries,* 90 Wn. App. 448, 454, 966, P.2d. 909 (1998), *affirmed on other grounds*, 138 Wn.2d 1, 977 P.2d. 570 (1999). On review, the Supreme Court questioned whether this always was always true, and found it was unnecessary for either court to reach the issue because the claimant had not proved proximate causation. 138 Wn.2d at 8. Nevertheless, the Court of Appeals' statements are instructive and support the conclusion that a mere reference to hard work does not establish distinctiveness absent testimony that shows its nature or degree is distinguishable from that generally prevailing in many employments.

Dr. Peterson did not attempt to distinguish claimant's work activities from those generally prevailing in other employments and everyday life. She merely cited the perceived strenuous nature of claimant's work in addressing the cause of his condition. She did not state or imply that claimant's work was uncommonly strenuous or that the occasional lifting or maneuvering of heavy objects was not common to many jobs. In short, no part of Dr. Peterson's testimony reflects the requisite comparison of claimant's work activities to those existing in other employments or daily life. Her

testimony therefore provides no basis for finding that claimant's particular work exposure was distinctive. Dr. Peterson's testimony is therefore insufficient to support a finding that claimant's spondylosis arose naturally from his employment. *Dennis, supra; Gast, supra; Witherspoon, supra; see also Ruse, supra.*

The lack of foundation for Dr. Peterson's testimony compounded the inadequacy of her testimony. Dr. Tsirulnikov's opinion suffered from the same defect, as well as his failure to address whether claimant's work was distinctive. Both doctors based their opinions on the understanding that claimant's daily job regularly involved "very heavy" or "hard" physical labor that typically required him to frequently use his whole body to push or "manhandle" many of the 200 to 2500 full paper rolls that were processed each shift. (Peterson 10-14; Tsirulnikov 9-10). Claimant's testimony likewise focused almost entirely on one of his several jobs (assistant winder operator or "4th hand") and he stated it involved nearly constant lifting of paper cores, bending, twisting and "manhandling" several-hundred-pound paper rolls "dozens" of times every day. (Claimant 16-23).

However, claimant's admissions on cross-examination effectively repudiated these assertions. Claimant admitted he had to maneuver (*i.e.*, "manhandle") the rolls only when the production lines were shut down, which occurred less than daily, and that when he did so the weight of the roll was supported by the conveyor belt. (Claimant 42-43). He also conceded that most of the paper cores with which he worked weighed only 2 to 10 pounds, and that the heaviest cores, which he used only occasionally, were only 25 pounds. (Claimant 39). Claimant further admitted that an automated cradle lifted the completed rolls and put them on a conveyor belt. (Claimant 41-42). And he conceded that at least 20 percent of his job as an assistant winder operator involved pushing buttons and monitoring machines, and that his other two jobs also were not heavy. (Claimant 36-38, 43-46).

In short, claimant's admissions on cross-examination flatly contradicted his direct-examination description of the job and the history that he provided to Dr. Peterson and Dr. Tsirulnikov. Claimant's admissions therefore destroyed the probative value of the job duty description on which his experts relied. *Thiel v. Department of Labor & Industries,* 56 Wn.2d 259, 352, P.2d 185

(1960). This further renders the testimony of Dr. Peterson and Dr. Tsirulnikov wholly insufficient to support a finding that claimant's spondylosis arose naturally out of distinctive workplace conditions. *Id.;* ER 703; *Sayler v. Department of Labor & Industries*, 69 Wn.2d 893, 421 P.2d 362 (1966).

Claimant also argues the record here is similar to that in *Dennis* and that, because the testimony there was found sufficient to create an issue of fact on the "arises naturally" issue, the testimony of Dr. Peterson must also be deemed sufficient to satisfy his burden of proof and support the jury's decision. (BR 10). In *Dennis*, the court addressed primarily whether a workplace aggravation of a preexisting, nonindustrial disease could be compensable, and the proper interpretation of the "arises naturally" prong of the occupational disease statute. 109 Wn.2d at 471-83. The court's discussion of the medical testimony was very limited and did not purport to provide an exhaustive account of the attending physician's testimony as to the distinctiveness of the claimant's work exposure. That makes it very difficult, if not impossible, to accurately compare the testimony in the two cases, and renders unreliable any attempt to use *Dennis* as a basis for

proving the sufficiency of Dr. Peterson's testimony. Moreover, the contradictory statements that claimant provided about his job make any such comparison groundless.

Finally, claimant characterizes Weyerhaeuser's position on appeal as being based on Dr. Rosenbaum's testimony that claimant's work activities were not distinctive to his employment. (RB 14; CP 427). This is inaccurate. Claimant's evidence is insufficient to establish his spondylosis arose naturally from distinctive conditions of his employment because his medical experts did not address the distinctiveness issue, and also relied on wholly unreliable information about his job. Dr. Rosenbaum's testimony merely shows that he did not provide support for the jury's decision and it therefore reinforces the conclusion that the jury had no proper basis for reaching its decision.

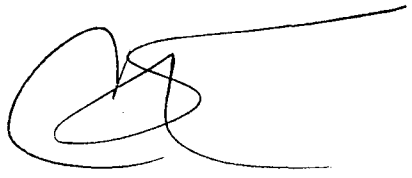
B. CONCLUSION

For the above reasons, the court should reverse the trial court's decision and find that claimant failed to present the expert medical testimony that is necessary to support a finding that his spondylosis arose naturally out of distinctive conditions of his

employment at Weyerhaeuser. The Board's decision, which affirmed rejection of this claim, should be reinstated.

The trial court's associated award of attorney fees and costs must also be reversed.

DATED: July 26, 2016.



Craig A. Staples, WSBA # 14708
Attorney for Weyerhaeuser

CERTIFICATE OF MAILING

I certify that on July 26, 2016, I served the foregoing Reply Brief of Appellant on the following persons by mailing them each a true copy by first class mail with the U.S. Postal Service at Vancouver, Washington in a sealed envelope, with postage prepaid, and addressed to the following:

Jill A. Karmy
Karmy Law Office PLLC
P.O. Box 58
2 S. 56th Pl. Ste. 207
Ridgefield, WA 98642-0058

Anastasia Sandstrom, AAG
Attorney General's Office
Labor & Industries Division
800 Fifth Avenue, Ste. 2000
Seattle, WA 98104-3188

I further certify that I filed the original and one copy of the same document by first class mail with the US Postal Service on the above date in a sealed envelope, with postage prepaid, and addressed to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

By: _____
Craig A. Staples WSBA #14708
Attorney for Weyerhaeuser